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In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES A. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 588 F.2d 481.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on January 25, 1979. A petition for rehearing was denied on February 28, 1979 (Pet. App. 7a). The petition for a writ of certiorari was filed on March 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether backdated certificates of deposit issued without the actual deposit of funds are "falsely made" securities within the meaning of 18 U.S.C. 2314.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on three counts of interstate transportation of falsely made securities, in violation of 18 U.S.C. 2314.[1] He was sentenced to concurrent terms of two years' imprisonment.[2] The court of appeals affirmed (Pet. App. 1a-5a).

[1] Petitioner was acquitted of making a false statement to a federally-insured bank, in violation of 18 U.S.C. 1014, and of conspiracy to violate 18 U.S.C. 1014 and 2314.

[2] The proceeding against co-defendant Boyd Hobbs was transferred to the Northern District of Alabama, where Hobbs pleaded guilty to one count of the indictment and was sentenced to one year's imprisonment (I R. 26-27). ("R." refers to the seven-volume record in the court of appeals, which contains the trial transcript.)

The relevant facts are not in dispute (Pet. 4). Petitioner was president of the Columbus Savings and Loan Association. In 1971 the Association developed "cash flow or cash shortage problems" as a result of unsound loans (V R. 958, 975-976).[3] Petitioner sought to conceal those problems from the Association's board of directors; together with co-defendant Boyd Hobbs, a developer of commercial properties, petitioner devised a sophisticated "kiting" scheme to increase the Association's cash reserves (Pet. App. 2a).

The scheme involved the issuance of certificates of deposit by the Association without the actual deposit of funds (III R. 421-424, 520-531; V R. 965-967). Co-defendant Hobbs would arrange with out-of-state banks to obtain business loans to be secured by certificates of deposit. Petitioner would then issue backdated certificates of deposit and give them to Hobbs for use as collateral.[4] Petitioner also authorized as-

[3] By August 1971, the Association's liquidity problems had reached the point where it had a $243,000 deficit balance at its depository bank, and savings withdrawals exceeded deposits by $50,000. Thus, if all the Association's outstanding checks were presented for payment, it would have been seriously overdrawn and would have had to borrow against legally required reserve deposits to meet its obligations (IV R. 831-835; V R. 887-890, 959-965; Gov't Ex. 50 at 18).

[4] The certificates were issued in two different forms. Each form certified that Hobbs had placed funds on deposit in the Association as of the "date" of issue (Gov't Ex. 6a, 12a, 13a, 15a). The backdating of the certificates was essential to the success of the scheme (Pet. App. 3a). When Hobbs first attempted to pledge accurately dated certificates shortly after

signments of the certificates to the pledgee banks. In exchange for the certificates, Hobbs gave petitioner checks or drafts in the amount of the face value of the certificates. Pursuant to a previous agreement, however, petitioner did not negotiate the checks or enter the transactions in the Association's ledger.

Hobbs then transported the certificates in interstate commerce to the pledgee banks, which accepted the certificates as collateral for their loans to Hobbs. Hobbs later deposited the loan proceeds in his account to cover the checks that he had previously written. Upon receiving notification from Hobbs that the checks were covered, petitioner negotiated the checks and recorded the transactions on the Association's books (reflecting receipt of the checks and issuance of the certificates) (V R. 991).

Over a two-year period, petitioner issued to Hobbs nearly $4 million in backdated certificates of deposit (IV R. 783). During that period, petitioner also approved loans to Hobbs totalling several million dollars, which petitioner concealed from the Association's board of directors (IV R. 696-700, 701-708; V R. 940-942; 948-949; Gov't Ex. 55). The Association lost

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they were issued, officers of the pledgee banks questioned why the certificates were being pledged immediately after issuance (III R. 522-524). Thereafter, petitioner backdated all of the certificates in order to insure that they would be acceptable to the lending banks (V R. 983-986). Because the certificates represented that Hobbs held substantial assets at the Association, his credit worthiness was enhanced. Petitioner admitted that "anyone reading the certificate would assume that those deposits were actually there in the Association" (V R. 991).

substantial amounts of money when Hobbs defaulted on these loans; the full extent of the Association's losses were undetermined at the time of trial (IV R. 711, 764, 793-795).[5]

Petitioner conceded at trial that Hobbs' checks for the certificates of deposit were not processed through regular channels until after loans had been obtained on the certificates (V R. 904-906, 966-970, 978-979, 987, 991-993). He also admitted that although the certificates purported to represent deposits on account at the Association on the date they were issued (V R. 991), the Association would not have been obligated to pay Hobbs unless and until his checks had cleared (V R. 993-995).[6]

In its instructions to the jury, the district court stated (VII R. 48):

> A falsely made security is one issued without any real or believed obligation on the part of the maker to pay or redeem the security on the demand of the person to whom it is issued. The issuance of a savings certificate without the actual deposit of the funds represented by the certificate does not obligate the maker to pay the purported depositor and therefore falsifies the

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[5] Approximately 10% of the Association's liabilities were in certificates issued to Hobbs; approximately 30% of its assets were in loans to Hobbs, including loan participations that had to be repurchased by the Association from other institutions when Hobbs defaulted (IV R. 781-788, 790-792; V R. 971-972, 974-977).

[6] The certificates of deposit were valid obligations of the Association as to innocent third party assignees who took them for value.

nature of the instrument within the meaning of Section 2314.

In affirming petitioner's conviction, the court of appeals held that there was sufficient evidence to support the jury's finding that the securities in question were "falsely made" within the meaning of 18 U.S.C. 2314. The court rejected the argument that the term "falsely made" relates exclusively to genuineness of execution, and concluded that the certificates of deposit were "falsely made" in this case because petitioner "knew that Hobbs' checks would bounce if immediately negotiated and hence he knew that there was no obligation on the part of the Association to honor the CD at the time it was issued" (Pet. App. 4a-5a).

ARGUMENT

The certificates of deposit involved in this case were issued at petitioner's direction and were then transported by Hobbs in interstate commerce and pledged as collateral for loans. The certificates falsely represented that Hobbs had a specified sum on deposit in an existing savings account at the Association. In addition, the certificates stated that they had been issued on a date prior to the date on which they actually were issued. The question here is whether those certificates were "falsely made" within the meaning of 18 U.S.C. 2314. We submit that the falsely dated certificates, issued as part of a fraudulent scheme to obtain loans from other institutions by false pretenses, were "falsely made" as that term is used in Section 2314.[7]

The term "falsely made" is not defined in Section 2314 or in any of the other sections of the criminal code in which it is employed.[8] Moreover, the legislative history provides no assistance in defining "falsely made."[9] The term "forged," also appearing in the statute, was usually used at common law in reference to the "'*false* making * * * of any written instrument for the purpose of fraud and deceit.'" *Gilbert* v. *United States*, 370 U.S. 650, 656 (1962) (emphasis in original) (quoting from 2 East, *Pleas of*

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[7] The parties who were directly deceived by petitioner's scheme to negotiate false certificates of deposit were the lending banks that received them as collateral. Those lenders were deceived about the amount of assets owned by Hobbs. They were led to believe that he owned substantial, previously existing liquid assets. In fact, however, the deposits were not an independent cushion for the loans; the loans themselves were used to create the deposits under petitioner's kiting scheme. The funds of the lenders were not used to augment the resources of a business borrower with substantial collateral, but rather to supply liquidity to a savings and loan association with serious cash management and loan portfolio deficiencies.

[8] See, *e.g.*, 18 U.S.C. 478 (foreign obligations or securities), 18 U.S.C. 495 (contracts, deeds, and powers of attorney), 18 U.S.C. 507 (ship's papers), 18 U.S.C. 1426 (naturalization or citizenship papers), 18 U.S.C. 1543 (passports).

[9] The predecessor of the provision at issue here was enacted in 1939 as an amendment to the National Stolen Property Act, ch. 413, 53 Stat. 1178. The committee reports do not discuss the intended meaning of the term "falsely made." See S. Rep. No. 674, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 422, 76th Cong., 1st Sess. (1939).

the Crown 852 (1803)); see also *id.* at 656-657 & nn.8-10.

While it is clear that forgery and false making are closely related concepts, the lower courts disagree over whether the term "falsely made," as used in Section 2314 and its predecessors, was meant to be synonymous with forgery or was intended to have a broader meaning. The Fourth, Seventh and Tenth Circuits hold that the two terms are essentially synonymous. See *United States* v. *Jones*, 553 F.2d 351, 354 (4th Cir.), cert. denied, 431 U.S. 968 (1977); *Greathouse* v. *United States*, 170 F.2d 512, 514 (4th Cir. 1948); *United States* v. *Johnson*, 504 F.2d 622, 625 (7th Cir. 1974); *United States* v. *Crim*, 527 F.2d 289, 294 (10th Cir. 1975), cert. denied, 425 U.S. 905 (1976); *United States* v. *Williams*, 498 F.2d 547, 551 (10th Cir. 1974); *Marteney* v. *United States*, 216 F.2d 760, 763 (10th Cir. 1954). On the other hand, the Fifth, Sixth, and Eighth Circuits adhere to the view that "the purpose of the term 'falsely made' was to broaden the statute beyond rigorous concepts of forgery and to prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method by which the introducer or his confederates effected their lack of authenticity." *United States* v. *Huntley*, 535 F.2d 1400, 1402 (5th Cir. 1976), cert. denied, 430 U.S. 929 (1977). See *United States* v. *Hagerty*, 561 F.2d 1197, 1199 (5th Cir. 1977); *Stinson* v. *United States*, 316 F.2d 554, 555-556 (5th Cir. 1963); *United States* v. *Tucker*, 473 F.2d 1290, 1293-1294

(6th Cir.), cert. denied, 412 U.S. 942 (1973); *Pines* v. *United States*, 123 F.2d 825, 828 (8th Cir. 1941).

In cases construing the term "forgery" under various statutes, the courts "have generally drawn a distinction between false or fraudulent statements and spurious or fictitious makings." *Gilbert* v. *United States*, *supra*, 370 U.S. at 658. Where the falsity lies in the representation of underlying facts described in a document, but not in the genuineness of its execution, forgery is generally found not to exist. *Ibid.* The same distinction between falsity of representation and execution has also been applied by a number of courts in interpreting the "falsely made" provision of Section 2314. See *United States* v. *Jones*, *supra*, 553 F.2d at 355; *United States* v. *Johnson*, *supra*, 504 F.2d at 625-626; *Melvin* v. *United States*, 316 F.2d 647, 648 (7th Cir. 1963); *United States* v. *Brown*, 246 F.2d 541, 542 (2d Cir. 1957); *Marteney* v. *United States*, *supra*, 216 F.2d at 763-764; *Wright* v. *United States*, 172 F.2d 310, 311 (9th Cir. 1949); *Greathouse* v. *United States*, *supra*, 170 F.2d at 514.

Thus, under this restrictive view, a security is not falsely made within the statutory definition if it is drawn by the maker in his own name on an existing bank in which he has inadequate funds, since in that situation the security is authentic in its execution; the falsity is merely in the implicit representation that adequate funds are on account at the institution. See, *e.g.*, *United States* v. *Metcalf*, 388 F.2d 440, 442 n.4 (4th Cir. 1968); *Hall* v. *United States*, 372 F.2d

603, 607 n.8 (8th Cir. 1967); *Marteney* v. *United States, supra,* 216 F.2d at 763; *Wright* v. *United States, supra,* 172 F.2d at 311-312. But see *United States* v. *Hagerty, supra.* A security drawn on a nonexistent institution, however, is falsely made under Section 2314, since there could be no genuine instrument issued by a fictitious bank. See, *e.g., United States* v. *Lipscomb,* 546 F.2d 787 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977); *Pines* v. *United States, supra,* 123 F.2d at 828. Similarly, the statute is deemed to have been violated if the maker uses a fictitious name or an unauthorized signature of another in drawing the security. See, *e.g., United States* v. *Huntley, supra,* 535 F.2d at 1403; *United States* v. *Crim, supra,* 527 F.2d at 294; *United States* v. *Seay,* 518 F.2d 646, 647-648 (7th Cir.), cert. denied, 423 U.S. 995 (1975); *United States* v. *Tucker, supra,* 473 F.2d at 1294.

Even though there is disagreement among the circuits about the outer limits of Section 2314, that disagreement is not material to the outcome of the present case. The certificates of deposit involved here were falsified during the process of execution, in furtherance of petitioner's fraudulent scheme.[10] The

[10] The fraudulent backdates were integral parts of the execution of the certificates of deposit. See Government Exhibits 12a, 13a, and 15a, which were executed as follows:

> "WITNESS the seal of the undersigned and the signature of its duly authorized officers, this the 18 day of October 1972. THE COLUMBUS SAVINGS AND LOAN ASSOCIATION Jane P. Anderson."

false backdating in the execution of the certificates was just as much fraud in the making of the securities as if a false signature had been affixed to them. None of the cases cited by petitioner holds otherwise, or suggests that fraudulent backdating is not falsity in the execution of a security.[11] Thus, while there may be disagreement among the circuits concerning the precise scope of the term "falsely made," that disagreement is not significant here; to the contrary, it appears that the other circuits (including those that require fraud in the execution of the security or equate false making with forgery) would likely agree with the Fifth Circuit in this case that securities that are falsely backdated when executed as part of a scheme to defraud are "falsely made."

See also Government Exhibit 6a, which was executed as follows:

> "Date December 29, 1971
> The Columbus Savings and Loan Association
> By Jane P. Anderson"

[11] Moreover, even if "false making" is defined narrowly as the equivalent of "forgery," it is significant that forgery was not limited at common law to the act of simulating another person's signature; rather, forgery was held to encompass the fraudulent making or altering of a writing to the detriment of another. See *Gilbert* v. *United States, supra,* 370 U.S. at 656-657 & nn.8-10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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